In the
Supreme Court of the United States

OCTOBER TERM, 1955

No. ——

DISTRICT OF COLUMBIA, *Petitioner*

v.

RADIO CORPORATION OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The District of Columbia, a municipal corporation, through its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming a decision of the District of Columbia Tax Court which cancelled in their entirety District of Columbia corporation franchise taxes assessed against respondent for the years 1949, 1950 and 1951, based upon sales of commercial products, other than sales to the United States, which respondent, a corporation having offices within and engaging in and carrying on business within the District of Columbia, made to District of Columbia customers during those years.

OPINIONS BELOW

The official opinion of the United States Court of Appeals for the District of Columbia Circuit has not been reported as yet in either the official reports of that Court or in the Federal Reporter. The opinion is included herein on page 1a, *infra,* of Appendix A to this petition.

The opinion of the District of Columbia Tax Court does not appear in any official report, but is contained in 83 Washington Law Reporter 737, an unofficial reporter containing opinions of the courts of the District of Columbia. The opinion of the District of Columbia Tax Court, and its decision, from which an appeal was taken to the United States Court of Appeals for the District of Columbia Circuit, are included in the Joint Appendix printed in accordance with the rules of the United States Court of Appeals for the District of Columbia Circuit and filed with this petition.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 5, 1956, and is included herein on page 5a, *infra,* of Appendix A to this petition.

It is believed that this Court is vested with jurisdiction to review the judgment of the United States Court of Appeals for the District of Columbia Circuit by Writ of Certiorari under the provisions of Title 28, Part IV, Section 1254(1), United States Code, as amended, and Section 4, Title IX, District of Columbia Revenue Act of 1937, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223 (Section 47-2404, D. C. Code, 1951).

STATEMENT OF QUESTION PRESENTED

The District of Columbia Income and Franchise Tax Act of 1947, as amended, imposes a franchise tax on all corporations engaged in or carrying on any trade or business within the District; measures that tax by the portion of the net income of the corporation as is fairly attributable to the trade or business carried on or engaged in within the District, and such other net income as is derived from sources within the District, and provides that in the case of corporations carrying on or engaging in a trade or business both within and without the District the portion of the net income subject to District tax shall be determined under regulations prescribed by the Commissioners of the District of Columbia. Regulations promulgated by the Commissioners of the District of Columbia in 1948 excluded from the measure of the District tax all sales of property within the District by a taxable corporation which were not principally secured, negotiated or effected by agents or employees of such corporation *located* within the District. Recognizing the invalidity of their 1948 regulations in that they did not comport with the District of Columbia Income and Franchise Tax Act of 1947, as amended in 1948, the Commissioners, in 1953, amended the regulations so as to include in the measure of the tax sales made to District of Columbia customers by corporations carrying on or engaging in business within the District of Columbia irrespective of the *location* of the salesmen for such corporations, of which no mention is made in the statute. These amendments were made applicable to the taxable year beginning on the first day of January, 1948, and to succeeding taxable years. Respondent, a corporation carrying on and engaging in business within the District, and maintaining offices

within the District during the years 1949, 1950 and 1951 made sales of its products to customers in the District, operating through salesmen attached to its offices located outside the District of Columbia. These sales amounted to $4,379,484.54 for the year 1949, $6,516,117.66 for the year 1950 and $5,202,093.57 for the year 1951. The question presented is:

1. Was it not error for the United States Court of Appeals for the District of Columbia Circuit to hold that the tax liability of respondent must be determined on the basis of the invalid 1948 regulations, under which respondent escaped all taxes on sales of its products to District customers, rather than under the 1953 regulations which were in conformity with the statute, and under which respondent was liable for tax on sales made by it in the District of Columbia?

STATUTES, AND REGULATIONS PROMULGATED BY THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA, INVOLVED:

Statutes Involved:

Sec. 4(h), Art. I, Title I; Secs. 1 and 2(a), Art. I, Title III; Secs. 1 and 2, Art. I, Title VII; Secs. 1 and 2, Art. I, Title X; District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 328, ch. 258, as amended by the Act of May 3, 1948, 62 Stat. 206, ch. 246 (Secs. 47-1551c.(h); 47-1557a.(a); 47-1557a.(b)(13); 47-1571; 47-1571a.; 47-1580; 47-1580a., D. C. Code, 1951 ed.).

Regulations Involved:

The regulations promulgated by the Commissioners of the District of Columbia in 1948 pursuant to the District of Columbia Income and Franchise Tax Act of 1947, as amended, are not contained in any official

or unofficial report published either by the District of Columbia or any reporting service. The regulations promulgated by the Commissioners of the District of Columbia in 1953, amending their 1948 regulations are set forth in a publication printed by the Government of the District of Columbia in 1956, entitled "District of Columbia Tax Regulations" and are also contained in "District of Columbia Tax Service", published by Commerce Clearing House under the heading "The Corporation Tax Service—State and Local". The regulations are found in that publication under paragraphs 13-912 and 13-914.

The pertinent provisions of the District of Columbia Income and Franchise Tax Act of 1947, as amended, and the pertinent regulations promulgated by the Commissioners of the District of Columbia pursuant to that Act, are printed in Appendix B, *infra*. pp. 1b-10b.

STATEMENT OF THE CASE

Respondent, a Delaware Corporation, manufactures and sells various types of commercial electronic equipment and other products such as radio sets, phonographs, television sets, radio and television tubes, and phonograph and recording records (R. 1-2). During the years 1949, 1950 and 1951 the domestic manufacturing and sales activities of respondent were conducted through four products departments known as the Engineering Products Department, the Home Instrument Department, the Record Department and the Tube Department. In addition to the manufacturing and selling departments which respondent maintained, respondent operated a Patent Department and a Frequency Bureau which was a part of the laboratories division of the corporation. Respondent, during the years 1949, 1950 and 1951 maintained offices

within the District of Columbia which were occupied and used by respondent in the conduct of its corporate activities. These offices were occupied by representatives of the Tube Department, which opened an office at 1757 K. St., N.W., Washington, D. C. in May, 1951, the Engineering Products Department, which had offices in the Commonwealth Building, Washington, D.C. during each of the years 1949, 1950 and 1951, and the Patent Department and the Frequency Bureau, which also had office space in the Commonwealth Building during each of those years (R. 1-4).

Respondent's gross income from sales of its products and leasing of its recording records to customers located in the District of Columbia for the years 1949, 1950 and 1951 were as follows:

Department	1949	1950	1951
Home Instrument	$3,408,875.33	$5,282,511.93	$3,584,938.98
Record	261,529.41	308,190.87	424,864.39
Tube	440,829.70	574,767.65	724,257.98
Engineering Products	268,250.10	350,647.21	468,032.22
	$4,379,484.54	$6,516,117.66	$5,202,093.57

(R.4)

Sales of respondent's products to its District of Columbia customers were made primarily to distributors who, in each case, held their appointment as a consequence of a letter of appointment issued by respondent (R. 7, 10-11, 15-26, 31-35). Respondent employed in each of its manufacturing and selling departments salesmen who, from time to time, came to the District of Columbia for the purpose of promoting sales of respondent's products to its District of Columbia distributors and, also, for the purpose of promoting sales of respondent's products to ultimate consumers of those products in the District of Columbia. In addition, respondent made available to its

distributors cooperative advertising funds for sales promotional purposes by those distributors in the District of Columbia. These funds were made up of contributions by both respondent and the distributors and were used for the purpose of advertising respondent's products over the name of the distributor or the names of the retail dealers offering respondent's products for sale (R. 8-9, 13-14, 26-27, 31). The salesmen employed by respondent, and who were involved in the promotion of sales of respondent's products within the District of Columbia, did not live in the District of Columbia and were not assigned to offices maintained by respondent in the District of Columbia. Upon the receipt of orders by respondent from its District customers for products manufactured and sold by it, respondent shipped the products into the District of Columbia from stocks which it maintained outside the District of Columbia (R. 4, 12, 14, 26-28, 35-36).

The District of Columbia Income and Franchise Tax Act of 1947, as amended, imposes a corporation franchise tax on all corporations engaged in business in the District of Columbia measuring that tax by the portion of the net income of the corporation as is fairly attributable to the business carried on or engaged in within the District, and such other net income as is derived from sources within the District. This Act provides that where net income of a corporation is derived from sources both within and without the District, the portion of that income subject to tax shall be determined under regulations prescribed by the Commissioners. The Assessor of the District of Columbia is authorized to employ any formula provided in a regulation prescribed by the Commissioners which should be applied, in his opinion,

to properly determine the net income of any corporation subject to tax under the Act. In 1948 the Commissioners adopted regulations which provided, as to sales of tangible personal property, that the portion of gross income to be apportioned to the District

> "* * * shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business located in the District; and the phrase 'total sales' shall mean the gross receipts from all sales." (App. 6b-7b.)

In 1953 the Commissioners amended the regulations of 1948 making the amendments applicable to the taxable year or part thereof beginning on the first day of January, 1948 and to succeeding taxable years, and providing, by the amendment, that in determining District sales those sales

> "* * * shall mean all sales to District customers the income from which is fairly attributable to the trade or business carried on or engaged in within the District, including solicitation in the District by salesmen or other representatives of the taxpayer, that portion of sales to customers outside the District the income from which is fairly attributable to the trade or business carried on in the Dis-

trict, and sales of tangible personal property the income from which is from District sources." (App. 9b.)

Respondent filed with the Assessor of the District of Columbia corporation franchise tax returns for the years 1949, 1950 and 1951, which contained the following information relating to its total gross sales, its District of Columbia sales, the amount of those sales which were apportioned by respondent to the District, and the tax which respondent computed as due the District of Columbia:

	1949	1950	1951
Total Gross Sales	$286,724,157.34	$452,676,201.68	$407,542,968.59
District of Columbia Sales	69,842.67	158,733.53	150,842.58
Apportionment Factor	.00024359	.000350655	.000370126
Total Net Income	37,069,963.56	90,749,804.67	40,461,785.10
District of Columbia Portion	8,751.96	31,103.74	13,953.64
Tax due District of Columbia	437.60	1,555.19	697.68

(R.4)

The Assessor of the District of Columbia concluded that there were deficiencies in tax due the District of Columbia for the years 1949, 1950 and 1951 and, accordingly, assessed such deficiencies against respondent as follows:

Year	Tax	Interest	Total
1949	$27,001.41	$7,182.38	$34,183.79
1950	62,287.94	12,831.32	75,119.26
1951	23,364.15	3,411.17	26,775.32
Total	$112,653.50	$23,424.87	$136,078.37

(R.5)

The conclusion of the Assessor was based upon a determination that respondent's District sales were those actually made by it to District of Columbia customers in the amount of $4,379,484.54 for the year 1949, $6,516,117.66 for the year 1950 and $5,202,093.57 for the year 1951, rather than the amounts reported on respondent's returns (R. 5). Following payment of the deficiency assessments, respondent appealed to the District of Columbia Tax Court seeking a refund of those taxes. That Court had jurisdiction over respondent's appeal under the provisions of Section 1, Title XV, District of Columbia Income and Franchise Tax Act of 1947, as amended [Act of July 16, 1947, 61 Stat. 328, ch. 258, as amended (Section 47-1593 and Sections 47-2401, et seq., D.C. Code, 1951)]. Following a decision of the District of Columbia Tax Court cancelling the assessments of deficiencies in taxes against respondent on the ground that it was not liable under the 1948 regulations for a tax on its sales to District customers, the District of Columbia appealed to the United States Court of Appeals for the District of Columbia Circuit. The United States Court of Appeals for the District of Columbia Circuit had jurisdiction over the appeal pursuant to the provisions of Sections 3 and 4, Title IX, District of Columbia Revenue Act of 1937, 50 Stat. 673, ch. 690, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223 and as amended by Sections 3(a) and 3(b) of the Act of July 10, 1952, 66 Stat. 543, ch. 649 (Sections 47-2403 and 47-2404, D.C. Code, 1951). That Court, on April 5, 1956, rendered a decision affirming the decision of the District of Columbia Tax Court cancelling the assessments of deficiencies in corporation franchise taxes against respondent.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the District of Columbia Circuit in this case is not of that category of decisions which this Court, in *Del Vecchio* v. *Bowers*, 296 U.S. 280, 80 L. Ed. 229, 56 S.Ct. 190, said this Court would not ordinarily review. This case, and the results which follow upon the decision of the United States Court of Appeals for the District of Columbia Circuit, are matters of paramount importance to the District of Columbia and to the administration of its tax statutes. This case is equal in importance within its scope to *District of Columbia* v. *Murphy*, a District of Columbia income tax case which this Court decided in 1941, 314 U. S. 441, 86 L. Ed. 329, 62 S. Ct. 303; and to *Pace* v. *District of Columbia*, 320 U.S. 698, 88 L. Ed. 408, 64 S.Ct. 406, a District of Columbia inheritance tax case which this Court decided January 10, 1944.

The petition for a writ of certiorari sought by the District of Columbia in this case presents to this Court for consideration a decision of the United States Court of Appeals for the District of Columbia Circuit which is at variance with decisions of this Court and decisions of United States Circuit Courts of Appeal in similar matters, and which is at variance with the District of Columbia Income and Franchise Tax Act of 1947, as amended. (61 Stat. 328, ch. 258, as amended by the Act of May 3, 1948, 62 Stat. 206, ch. 246). That statute is the basis for a major part of the revenues raised by the District of Columbia for the carrying out of its governmental functions.

The decision of the United States Court of Appeals for the District of Columbia Circuit, by approving regulations promulgated by the Commissioners of the

District of Columbia in 1948 and rescinded by regulations promulgated in 1953 and made applicable to 1948, and to succeeding years has, in effect, materially reduced revenues of the District of Columbia which the Franchise Tax Act was designed to produce.

The United States Court of Appeals for the District of Columbia Circuit refused in this case to permit the application to respondent of the regulations promulgated by the Commissioners of the District of Columbia in 1953 correcting the regulations promulgated by them in 1948. That Court, without discussing either the statutory requirements of the District of Columbia Income Franchise Tax of 1947, as amended, or the effect upon this statute of the regulations promulgated by the Commissioners of the District of Columbia in 1948, concluded to adhere to its ruling in *Lever Bros. Co.* v. *District of Columbia*, 92 U.S. App. D. C. 147, 204 F. 2d 39, in which that Court had stated that the 1948 regulations were valid. *Lever Bros. Co.* v. *District of Columbia, supra* did not involve, as does the present case, the question whether the 1948 regulations were or were not valid and was confined entirely to the disposition of the contention of Lever Bros. Co. that, even if it was taxable under the Franchise Tax Act, the 1948 regulations were not properly applicable to it so as to include in the measure of the tax payable by it any sales of personal property by Lever Bros. Co. in which title to that property passed outside the District. The District of Columbia, in its cross-appeal, contended only that it was error for the District of Columbia Tax Court (then known as the Board of Tax Appeals for the District of Columbia) to disregard the Commissioners' regulations and, in determining the tax liability of Lever Bros. Co., to substitute a formula which the Board thought was applicable. The United States

Court of Appeals for the District of Columbia Circuit concluded parenthetically that the 1948 regulations were valid under the Act, and that the Board of Tax Appeals erred in substituting any other regulations. The question therefore of the validity of the 1948 regulations has not of itself ever been presented before the United States Court of Appeals for the District of Columbia Circuit with the exception of the case presented on this petition for a writ of certiorari.

The District of Columbia Income and Franchise Tax Act of 1947, as amended, imposes a franchise tax on all corporations engaged in a trade or business in the District of Columbia. The Act is designed, where corporations are engaged in business both within and without the District of Columbia, to provide for the District of Columbia a franchise tax upon the net income of such corporations as is fairly attributable to the trade or business engaged in within the District of Columbia and such other income as is derived by those corporations from District of Columbia sources. The Act, and the amendments to that Act made by the Act of May 3, 1948, *supra*, clearly indicate that a corporation engaged in business in the District of Columbia through sales of commercial products to District of Columbia customers is to be taxed upon that portion of its total net income as is represented by the income derived by it from the District of Columbia. In 1948 the Commissioners of the District of Columbia promulgated regulations which eliminated from consideration for District tax purposes all sales of personal property by a corporation engaged in business in the District of Columbia unless those sales were principally secured, negotiated or effected by agents, officers or employees of the corporation *located* in the District of Columbia. These regulations were

at variance with the Franchise Tax Act, which contains no reference to the location of salesmen for corporations engaged in business within the District of Columbia and which, unqualifiedly, makes sales to District of Columbia customers taxable irrespective of the location of the salesmen for the selling corporation. In 1953 the Commissioners of the District of Columbia, recognizing the error committed by them in the promulgation of their 1948 regulations, amended those regulations so as to eliminate the requirement that to be considered for District of Columbia Franchise Tax purposes sales of personal property by a corporation engaged in business within the District of Columbia must be made by salesmen located in the District of Columbia. The Commissioners, by their 1953 amendments to the 1948 regulations, specifically provided that such amendments should apply to the taxable year or part thereof beginning on the first day of January, 1948, and to succeeding taxable years, as did the 1948 amendments to the statute. Respondent, by the decision of the United States Court of Appeals for the District of Columbia Circuit in this case, has benefited from the 1948 regulations to the extent that none of its commercial sales to District of Columbia customers, and none of the income derived by respondent from those sales in 1949, 1950 and 1951 can be taxed by the District of Columbia under the District of Columbia Income and Franchise Tax Act of 1947, as amended.

The regulations adopted by the Commissioners of the District of Columbia in 1953 did not create a liability for tax where none existed under the Franchise Tax Act. The application to respondent of the regulations promulgated by the Commissioners in 1953 would, as the statute requires, provide to the District of Columbia a Franchise Tax upon the income of re-

spondent taxable under the Act. The regulations of 1948 are manifestly erroneous. In such cases this Court, and the several United States Circuit Courts of Appeal, have uniformly concluded that adminstrative officials may correct erroneous action taken by them in the promulgation of regulations under a statute by the adoption of corrective regulations which will apply to events antedating the adoption of such corrective regulations. This Court in *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 133, 80 L. Ed. 528, 56 S. Ct. 397, said:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch* v. *Tilden Produce Co.*, 265 U.S. 315, 320-322; *Miller* v. *United States*, 294 U.S. 435, 439-440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. *International Ry. Co.* v. *Davidson*, 257 U.S. 506, 514. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable.
>
> "The contention that the new regulation is retroactive is without merit. Since the original regulation could not be applied, the amended regulation in effect became the primary and controlling rule in respect of the situation presented. It pointed the way, for the first time, for correctly applying the ante-

> cedent statute to a situation which arose under the statute. See *Titsworth* v. *Commissioner,* 73 F. (2d) 385, 386. The statute defines the rights of the taxpayer and fixes a standard by which such rights are to be measured. The regulation constitutes only a step in the administrative process. It does not, and could not, alter the statute. It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand."

The United States Circuit Courts of Appeal have, similarly, found no impediment to the application of a regulation to a factual situation antedating the promulgation of that regulation where such a regulation was designed to correct an earlier erroneous regulation. *Robert Hughes & Co., Inc.* v. *Commissioner of Internal Revenue,* 8th Circuit, 109 F. 2d 720; *Hock* v. *Commissioner of Internal Revenue,* 8th Circuit, 152 F. 2d 574; *Kay* v. *Commissioner of Internal Revenue,* 3rd Circuit, 178 F. 2d 772; *Larkin* v. *United States,* 8th Circuit, 78 F. 2d 951; *Titsworth* v. *Commissioner of Internal Revenue,* 3rd Circuit, 73 F. 2d 385.

This case is important to all corporations and unincorporated businesses engaged in a trade or business within the District of Columbia as well as without the District of Columbia. This case effects not only foreign corporations engaged in business within the District of Columbia, but all other taxpayers whose business, residence or domicile is within the District of Columbia. The legislation here involved is not of local importance only; it is of National importance. Congress, in enacting the District of Columbia Income and Franchise Tax Act of 1947, has acted not only in accordance with the authority conferred upon it by Article I, Section 8, Clause 17 of the Constitution which grants to the Congress plenary

power over the District of Columbia, but, by the very nature of the legislation, and its effect upon organizations located outside the District of Columbia, has acted in the exercise of its National powers. *Capital Transit Co.* v. *Hof,* 174 U.S. 1, 43 L. Ed. 873, 19 S. Ct. 80; *National Insurance Co.* v. *Tidewater Co.,* 337 U.S. 582, 599, 93 L. Ed. 1556, 69 S. Ct. 1173; *Neild* v. *District of Columbia,* 71 App. D.C. 306, 110 F.2d. 246.

Section 2, Article I, Title VII of the District of Columbia Income and Franchise Tax Act of 1947 imposes a tax at the rate of five p[illegible]rcentum upon the taxable income of every corporation, whether domestic or foreign, except those expressly exempt under the Act, "For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, * * *." (App. B, p. 3b)

Section 4(h), Article I, Title I of this Act, as originally enacted in 1947, defined the words "trade or business" to include "the engaging in or the carrying on of any trade, business, profession, vocation or calling, or commercial activity in the District of Columbia; * * *." (App. B, p. 1b.)

Net income, by Section 1, Article I, Title III of the Act, is defined to mean the gross income of a taxpayer less certain deductions permitted under Article I (App. B, p. 26). Gross income is stated in Section 2(a), Article I, Title III of the Act to include:

> "* * * income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this article, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain

> or profit, or gains or profits, and income derived from any source whatever." (App. B, p. 2b.)

Section 1, Article I, Title X of the Act states that it is the purpose of that article to impose "(2) a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District: * * *." That section provides that:

> "The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District." (App. B, p. 4b.)

Section 2, Article I, Title X of the Franchise Tax Act provides for apportionment for District tax purposes, of income derived by a corporation engaged in business both within and without the District of Columbia. In such cases, Section 2 states that:

> "Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any

corporation or unincorporated business subject to tax under this article." (App. B, p. 5b.) (Italics supplied)

By the Act of May 3, 1948, 62 Stat. 206, ch. 246, Congress amended the District of Columbia Income and Franchise Tax Act of 1947, insofar as that Act relates to the imposition of a franchise tax on corporations engaged in business within the District of Columbia. The amendments were however restricted to exempting or excluding from taxation under the District of Columbia Income and Franchise Tax Act of 1947 under specific conditions income derived from the sale of tangible personal property. Thus, by these amendments the Congress excluded from the definition of the words "trade or business" as used in Section 4 (h), Article I, Title I of the Act:

"(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; or

"(2) Sales of tangible personal property by a corporation or unincorporated business which does not maintain an office or other place of business in the District and which has no office, agent, or representative in the District except for the sole purpose of doing business with the United States, but such corporations and unincorporated businesses shall be subject to the licensing provisions in title XIV of this article."

"For purposes of this proviso, the words 'agent' or 'representative' shall not include any independent broker engaged independ-

> ently in regularly soliciting orders in the District for sellers and who holds himself out as such." (App. B, p. 1b.)

In addition, the Act of May 3, 1948 added to the *exclusions* from gross income, as set forth in Section 2(b), Article I, Title III, of the Act:

> "(13) Income derived from the sale of tangible personal property to the United States by corporations and unincorporated businesses having their principal places of business located outside the District, which property is delivered from places outside the District for use outside the District: *Provided, however*, that the taxpayer shall furnish to the Assessor a statement in writing of the amount of gross sales so made and, if required by the Assessor, a list of the names of the agencies of the United States through which such property was sold." (App. B, p. 3b.)

Finally, the Act of May 3, 1948, amended Section 1, Article I, Title X of the Franchise Tax Act, which deals with the measure of the franchise tax, as well as states the purpose of the article, by adding a proviso which reads:

> "That income derived from the sale of tangible personal property by a corporation or unincorporated business not carrying on or engaging in trade or business within the District as defined in title I of this article shall not be considered *as income from sources within the District for purposes of this article, with the exception of income from sales to the United States* not excluded from gross income as provided in title III, section 2(b)(13) of this article." (App. B, p. 4b.) (Italics supplied)

It is important to note that the Act of May 3, 1948, amending the District of Columbia Income and Franchise Tax Act of 1947 was confined to excluding from District of Columbia corporation franchise tax income derived from sales of personal property by corporations which, under the terms of the original act, had been taxed. The intention of the Congress in amending the Franchise Tax Act is clearly expressed in reports of the Committee on the District of Columbia of the United States Senate and the Committee on the District of Columbia of the House of Representatives. As stated in the Senate Report (Sen. Rep. No. 1042, 80th Cong. 2d sess.), the bill, S. 2409, which was enacted as the Act of May 3, 1948, had as its purpose the following:

> "The purpose of the bill is to clarify and limit the imposition of a tax upon the income of corporations or businesses which is 'derived from sources within the District of Columbia.' Due to the language appearing in the existing District of Columbia income-tax law, the imposition or assessment of the income tax was heretofore made against concerns casually engaged in business within the borders of the District of Columbia by such means as telephone, mail orders, traveling salesmen, and other nonconsistent means of solicitation. This bill will correct such situation, and limit the imposition of an income tax to those concerns factually engaged in business on their own account or through representatives or agents within the District of Columbia." (App. C, p. 1c.)

The report of the Committee on the District of Columbia of the House of Representatives, accompanying S. 2409 (House Rep. No. 1792, 80th Cong. 2d sess.), stated, in part, that:

> "The purpose of the bill, as amended, is to clarify the language and intent in the District of Columbia Income and Franchise Tax Act of 1947, in order that the tax so provided be not imposed on corporations and unincorporated businesses which do not maintain places of business or representatives in the District of Columbia, or on such concerns which maintain places of business or representatives in the District for the sole purpose of doing business with the United States, in respect to sales of tangible personal property delivered outside the District for use outside the District." (App. C, p. 4c.)

A consideration of the provisions of the District of Columbia Income and Franchise Tax Act of 1947, the amendments of that Act as contained in the Act of May 3, 1948, and the comments of the Committees of the Congress which considered those amendments, results in the conclusion that any regulations promulgated by the Commissioners of the District of Columbia which have the effect of exempting from District of Columbia Corporation Franchise Tax income derived by a corporation through sales of personal property in the District of Columbia, which is not exempt from tax by the amendments to the Franchise Tax Act of May 3, 1948, are at variance with the taxing requirements of the Act. This conclusion is required for the following reasons:

(1) All corporations engaged in carrying on any trade, business, or commercial activity in the District of Columbia, with the exception of certain specifically exempt organizations, are subject to a franchise tax for the privilege of carrying on that trade, business or commercial activity.

(2) The measure of the franchise tax to be paid by corporations subject to tax is that portion of the

net income of the corporation as is fairly attributable to any trade or business carried on or engaged in within the District *and* such other net income as is derived from sources within the District.

(3) Net income, under the Act, is gross income, which includes all income derived from sales or dealings in property whether real or personal and income derived from any trade or business or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever, reduced by specific deductions authorized under the Act.

(4) The only exclusions from tax liability (as provided by the 1948 amendments) are:

> (a) sales of tangible personal property by a corporation which does not physically have or maintain an office, warehouse or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District during the taxable year; (b) sales of tangible personal property by a corporation not maintaining an office or other place of business in the District except for the sole purpose of doing business for the United States; (c) income derived from the sale of tangible personal property to the United States by corporations having their principal places of business located outside the District, which property is delivered from places outside the District for use outside the District.

The application of the exclusionary provisions of the Franchise Tax Act, as those provisions relate to sales of tangible personal property and income, requires the determination that all other sales of tangible personal property to customers in the District

of Columbia by a corporation engaged in a trade or business in the District of Columbia are taxable in the manner provided by the Act.

On August 31, 1948, following the amendments of May 3, 1948, of the District of Columbia Income and Franchise Tax Act of 1947, the Commissioners promulgated regulations intended to provide a basis for apportioning to the District of Columbia the net income of a corporation engaged in business within and without the District of Columbia. These regulations, insofar as they pertained to sales of tangible personal property in the District of Columbia, provided as follows:

> "Sec. 10-2(d). *Income from Trade or Business.* If the trade or business is carried on entirely within the District, the entire gross income from trade or business shall be allocated to the District. If the trade or business is carried on partly within and partly without the District, that portion of the gross income from trade or business to be apportioned to the District shall be determined as follows:
>
> "(1) *Income from sales of tangible personal property.*
>
> "a. Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by owners, employees,

> agents, officers and branches of the corporation or unincorporated business located in the District; and the phrase 'total sales' shall mean the gross receipts from all sales." (App. B, p. 6b.)

The regulation, however, had the effect of adding to the statutory exclusions from franchise tax of certain types of sales of personal property in the District of Columbia, a further exclusion, not authorized by the Act, providing that, unless the personal property sold in the District of Columbia had been "principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business *located* in the District * * *" those sales were not taxable sales for apportionment purposes. (Italics supplied) Thus, under the Commissioners' Regulations of 1948, a sale of personal property within the District by a corporation engaged in a trade or business in the District of Columbia could not be considered for District corporation franchise tax purposes if the sale had not been principally secured, negotiated, or effected by some agent or officer of a corporation located in the District of Columbia notwithstanding that under the Act all sales of such property by corporations subject to tax were to be taxable except in those cases where the corporations did not maintain offices in the District of Columbia or, if they maintained such offices, maintained them solely for the purpose of doing business with the United States of America, or had their principal places of business outside the District and delivered the personal property to the United States outside the District for use outside the District. To circumvent the Act, therefore, all that was necessary under the Regulations of 1948 was for corporations engaged

in business in the District of Columbia to cause their agents to be located outside the District of Columbia and to transact their commercial business in the District of Columbia from such locations.[1]

Respondent Radio Corporation of America by the application of the 1948 Regulations, escapes tax on *all* of the income made by it from sales of personal property in the District of Columbia, with the exception of sales to the United States Government.[2] This result is the consequence of the fact that none of respondent's salesmen was "located" in the District of Columbia. Respondent, by virtue of its activities in the District of Columbia, was liable during the years in question for the payment of a corporation franchise tax to the District of Columbia. Since respondent maintained offices in the District of Columbia to carry on its commercial activities, the corporation could not qualify under any of the 1948 amendments of the Franchise Tax Act for an exclusion of its sales of personal property in the District of Columbia from consideration in determination of its tax liability. The application to respondent of regulations promulgated by the Commissioners of the District of Columbia in 1953, amending their 1948 regulations, produced a result in conformity with the Franchise Tax Act. Those regulations struck from the original regulations the requirement that to be considered for District of Columbia tax purposes sales of personal prop-

---

[1] *Owens-Illinois Glass Co.* v. *District of Columbia*, 92 U.S. App. D.C. 15, 204 F. 2d 29, recognized that extensive solicitation by salesmen in the District is plainly "commercial activity in the District" under the Franchise Tax Act.

[2] These sales to the United States, although conceded to be "taxable sales," are not, under the Franchise Tax Act, different from other local sales. The 1948 amendments of the Act specifically referred to such sales as income from District sources taxable under the Act. (See amendment to Section 1, Article I, Title X, App. B., p. 4b.)

erty must have been principally negotiated, secured or effected by agents of the taxable corporation who were located in the District of Columbia. The 1953 Regulations provided that in determining the portion of the net income of the corporation engaged in business within and without the District of Columbia to be apportioned to the District, as that income related to sales of tangible personal property:

> "* * * the phrase 'District sales' shall mean all sales to District customers the income from which is fairly attributable to the trade or business carried on or engaged in within the District, including solicitation in the District by salesmen or other representatives of the taxpayer, that portion of sales to customers outside the District the income from which is fairly attributable to the trade or business carried on in the District, and sales of tangible personal property the income from which is from District sources."
> ~~come from which is from District sources.~~" (App. 9b.)

The 1953 Regulations are a recognition by the Commissioners of the District of Columbia of the invalid exemption from corporation franchise tax which was caused by the 1948 Regulations. The 1953 Regulations are a recognition of the statutory provisions that a taxable corporation selling tangible personal property in the District of Columbia is subject to tax on the income derived from those sales and, further, that under the Act the location of a salesman of a corporation engaged in a trade or business within the District of Columbia is immaterial in measuring the tax liability of that corporation resulting upon its sales of personal property. The 1953 Regulations are a further recognition of the legislative history of the Franchise Tax Act, the results which flow from the

1948 amendments of that Act, and the ultimate requirement of the Act that where a corporation engages in a trade or business within the District of Columbia the income derived from District sources shall be subject to District of Columbia franchise tax.

CONCLUSION

The District of Columbia Income and Franchise Tax Act of 1947, as amended, clearly imposes a franchise tax upon the income realized by respondent from sales of its commercial products to customers in the District of Columbia. Regulations adopted by the Commissioners of the District of Columbia in 1948 exempted from tax under the Franchise Tax Act, with the exception of sales to the United States, all of the income derived by respondent from sales of its products to purchasers of those products in the District of Columbia. In view of the clearly erroneous effect of the 1948 regulations, the Commissioners, in 1953, promulgated amendments of the 1948 regulations eliminating from those regulations the improper language so as to conform the regulations with the requirements of the Franchise Tax Act. As conformed, the 1953 regulations were applicable to respondent's activities occurring prior to the adoption of the amendatory regulations, since the prior regulations were invalid. The action of the United States Court of Appeals in affirming the decision of the District of Columbia Tax Court, which had cancelled all assessments of franchise taxes against respondent based upon the 1953 regulations, thus permitting respondent to engage in commercial business in the District of Columbia without liability for tax, was contrary to decisions of this Court and the several United States

Circuit Courts of Appeal, and was contrary to the requirements of the District of Columbia Income and Franchise Tax Act of 1947, as amended. The effect of the decision of the United States Court of Appeals for the District of Columbia was to approve the action of administrative officials which had, in actuality, repealed, in part, the tax statute.

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VERNON E. WEST,
Corporation Counsel, D. C.

CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.

GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.

HENRY E. WIXON,
Assistant Corporation Counsel, D. C.
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

June, 1956.